IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 80-5010

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KENNETH HARDY,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF GEORGIA

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MARGUERITE B. FILSON
Western Electric Company, Incorporated
222 Broadway
New York, New York 10038

Attorney for Petitioner

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KENNETH HARDY,

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v.

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia in this case.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 245 Ga. 272, 264 S.E.2d 209 and is reproduced and attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 20, 1980. No petition for rehearing was filed. On May 9, 1980, Justice Powell granted petitioner's motion to extend the time to file this petition until July 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the failure of the trial court and the Georgia Supreme Court to place a limiting construction on the language of the Georgia statute permitting the jury to impose the death sentence in certain vaguely defined circumstances violated petitioner's Eighth and Fourteenth Amendment rights as set forth in Godfrey v. Georgia.

2. Whether the trial court's error in instructing the jury that it could impose the penalty of death upon the finding of a non-statutory aggravating circumstance tainted the sentencing deliberation in violation of petitioner's Eighth and Fourteenth Amendment rights.

3. Whether the improper, inflammatory and prejudicial closing arguments of the prosecutor which included quotations read from Georgia Supreme Court cases denied petitioner the fundamental fairness required by the due process clause and the reliability in sentencing required by the Eighth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code Ann. §27-2534.1:

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a captial felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Section 27-2534.1(b) is so found, the death penalty shall not be imposed.

STATEMENT

A. Background Facts

Kenneth Hardy was convicted and sentenced to death for having murdered one Lewis J. Ingram on July 30, 1977. The cast of characters in the events leading up to the crime is large. And, until the specific instances of physical abuse which ended in the shot-gun killing of Ingram, the events of that Saturday night in Commerce, Georgia do not appear to be particularly out of the ordinary given the social circumstances and milieu.

Lewis J. Ingram was a resident of North Carolina who had previously lived in the Commerce area and who still had relatives there. He spent Tuesday night, July 26, at his sister's home in Commerce and then, after telling her he was going to visit another sister who lived nearby (T.193)*/ he left. Instead of visiting his sister, Ingram checked into a motel (T.198) and began to frequent Charlie (Willie) Brown's Produce Stand on Highway #441 just outside of Commerce. (T.195) Brown saw that Ingram had several bills of large denomination on his person. (T.208) Charlie Brown's appears to have been a fairly popular place for local social gatherings and was the site of a weekly Saturday barbecue with many participants. (T.202)

Ingram visited Charlie Brown's on several occasions on Thursday and Friday and was observed to be drinking or to have been drinking rather steadily during that period. (T.197) This activity culminated in the barbecue at Charlie Brown's at which people began congregating during the afternoon of Saturday, July 30. Mr. Ingram continued his consumption of hard liquor and, as the evening wore on, was seen to be drinking quite heavily. (T.227)

*/ References to the trial court transcript are indicated by ("T. "). The supplemental transcript is indicated by ("Supp. T. ").

Socializing and drinking with Ingram during the barbecue were, among others, Buster Minish, Billy Hardy (petitioner's brother) and "Dub" Hardy (petitioner's father). (T.202-203) Petitioner was not present at the Charlie Brown barbecue that afternoon or evening. (T.209)

Late in the afternoon, Ingram left the barbecue with Buster Minish in Ingram's pick-up truck. (T.206) They were going, apparently, to play poker with Billy Hardy at Billy Hardy's trailer which was adjacent to Dub Hardy's home not far from the produce stand. (T.363)

The crowd at the barbecue broke up later in the evening and Dub Hardy arrived home with his wife, Mary Hardy, at about 9:P.M. (T.282) When they arrived, they found Buster and Betty Minish and Billy and Carolyn Hardy with Ingram in Billy's trailer. (T.283-284)

At some point, not made clear from the testimony, Billy and Buster left the Hardy residence area and returned with Kenneth Hardy. (T.245) It is here, at the culmination of an evening of barbecue, heavy drinking and poker playing that there is no precise picture of events. Testimony, often conflicting, was offered by Mary Hardy and Betty Minish and by Dub Hardy, who was convicted of aggravated assault upon Ingram. Billy Hardy, who was indicted with petitioner and who was found guilty of the murder in a separate trial, did not testify as to his version of the events. Buster Minish, who was evidently an active participant in the murder and the events leading up to it, apparently committed suicide several days thereafter. (T.537)

By all accounts however, Lewis Ingram was sitting on a couch in Billy Hardy's trailer at about 9:P.M. in a state of somewhat advanced inebriation. (T.286) Dub Hardy testified to having heard Buster Minish, Billy Hardy, Kenneth Hardy and L. J. Ingram in loud vocal argument at that time. (T.287)

Mary Hardy testified that she saw her husband, Dub, enter the trailer and push L. J. Ingram out so that he fell into the yard. She stated that her husband hit Ingram several times. (T.331-332) (Dub testified that he didn't touch Ingram and that it was the petitioner, his son, Kenneth, who did the beating.) (T.291) Shortly afterwards, L. J. Ingram was placed in the back of his pick-up truck and Kenneth and Billy Hardy and Buster Minish drove off in two vehicles, the other car being Buster's pick-up truck. (T.377) Sometime later that evening, Buster Minish and the two Hardy brothers returned in Buster's truck to Dub Hardy's residence. (T.334)

At approximately 1:30A.M. on July 31, 1977, the Banks County Sheriff's office received a telephone call informing them of a burning vehicle on the Jesse Shewbert Road in Banks County. Upon their arrival at the scene, deputies discovered the victim's body in the burning truck. (T.427) The cause of death was determined to have been by shot gun blast and the autopsy established that Ingram was dead prior to the fire. (T.496)

Subsequently, Billy, Kenneth and Dub Hardy were arrested and brought to the Banks County jail. (T.532) A warrant was issued for the arrest of Buster Minish who, before being apprehended on August 4, 1977, apparently shot himself and was pronounced dead on arrival at a nearby hospital. (T.537)

Petitioner's trial began with jury selection on Thursday, January 12, 1978 and concluded, after the jury found petitioner guilty, with a sentence of death on the evening of Friday, January 13, 1978.

Prior to sentencing, petitioner offered evidence in mitigation which included the testimony of his employer that Kenneth Hardy, who worked for him as a truck driver for three years had been one of the best workers he had ever had -- that petitioner could do the work of any two men and had missed only one day of work in three years. (T.601-602) A Baptist minister who knew petitioner and the Hardy family for over 20 years, testified as to Kenneth Hardy's sincere attempts to join the church and to overcome his rather unsavory bootlegging, liquor-hauling, family background. (T.606-609) Petitioner has no record of previous convictions. (Supp. T.22)

Kenneth Hardy's older sister also testified as to the attempts made by this particular brother to move himself away from the family both physically and behaviorally. (T.614-618)

No evidence as to aggravation was offered by the prosecution.

B. The Closing Arguments

At the close of evidence, the prosecutor urged the jury to convict petitioner of murder quoting the frequently disapproved language of an ancient Georgia case to bolster his argument, to wit:

> "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer from crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy.

> It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which bloody deeds occur. A stern, unbending, unflinching administration of the penal laws, without regard to position or sex, as it is the highest mark of civilization, is also the surest mode to prevent the commission of crime."
>
> Eberhart v. State, 47 Ga. 609 (1873)

The use of this language has been specifically condemned by the Supreme Court of Georgia as going beyond the propriety of advocacy.

Shortly thereafter, during the sentencing phase, the District Attorney further inflamed the passions and prejudices of the jury by quoting similar prejudicial language from another and even older Georgia Supreme Court case.

> "Human life is sacrificed at this day, throughout this land, with more indifference than the life of a dog, especially if it is a good dog. Cain was the first murder, but who is the last, is known only to those who have read the morning papers. If this crime goes unpunished, let our skirts, at least, be free from the stain of blood-guiltness."
>
> Hawkins v. State, 25 Ga. 207, 211 (1858)

C. The Court's Instructions On Sentencing

The instructions of the trial court to the sentencing jury contained flaws that cast serious doubt upon the validity of the death penalty imposed on petitioner. First, the trial court failed to define and delimit the aggravating circumstance it charged the jury to consider under the Georgia statute (Ga. Code Ann. §27-2534.1(b)(7)) as required by this Court in Godfrey v. Georgia. Second, the trial court erroneously informed the jury that it could impose the death penalty if it found a non-statutory aggravating circumstance. Since the jury found both aggravating circumstances, it is impossible to determine the weight the jury gave to the erroneous charge.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT'S FAILURE TO PROVIDE GUIDANCE TO THE SENTENCING JURY VIOLATES THE REQUIREMENTS FOR CAPITAL SENTENCING ESTABLISHED BY GODFREY V. GEORGIA

Petitioner's death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. This is so because his sentence rests upon a finding of the statutory aggravating circumstance set forth in Georgia Code Ann. §27-2534.1(b)(7)*/ which, as construed and applied in petitioner's case by the trial court and by the Georgia Supreme Court, violates the constitutional requirements laid down in Godfrey v. Georgia, 48 U.S.L.W. 4541 (U.S., May 19, 1980).

In scrutinizing Georgia sentencing under §(b)(7), it has been determined that there is a "constitutional responsibility to tailor and apply [the] law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey, supra at 4543. Thus, to pass constitutional muster, a limiting construction must be placed on the vague catch-all language of §(b)(7) by both the trial court's jury instructions and by the Supreme Court of Georgia in its review of a §(b)(7) sentencing procedure. It is evident that §(b)(7) as written, unless modified by restrictive jury instructions and judicial interpretation, utterly fails to "channel the sentencer's

*/ Ga. Code Ann §27-2534.1

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:.....

(7) ....The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id. The unlimited language of §(b)(7) includes, as determinative, the phrase "outrageously or wantonly vile, horrible and inhuman," which was deemed to be insufficient to imply "any inherent restraint on the arbitrary and capricious infliction of the death sentence." Id. at 4544.

The trial court's instruction to the jury in petitioner's case*/ was totally devoid of any guiding or limiting instruction as to the §(b)(7) aggravating circumstance.**/ The court charged the jury that it was authorized to impose the death penalty if it found, beyond a reasonable doubt, that "[t]he offense of murder was outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Appendix B at 7a-8a. The jury was given no further assistance regarding the §(b)(7) language. None of its terms was defined or delimited and no examples were given to guide the jury in its sentencing deliberations.

*/ Sentencing instructions set forth in full in Appendix B.

**/ The court also instructed the jury to consider, a non-statutory aggravating circumstance, i.e. "The offence of murder was committed while the offender was engaged in the commission of a robbery." Appendix B at 8a. Although the Georgia Supreme Court found that the trial court erroneously told the jury that the death penalty could be imposed on the finding of the non-statutory aggravating circumstance, it held that since the jury found both the non-statutory circumstance and the §(b)(7) aggravating circumstance there was no error. "A finding of only one statutory aggravating circumstance is all that is required to authorize the imposition of the death penalty." Hardy v. State, supra 264 S.E.2d at 215 (Appendix A at 5a). The prejudicial effect of the jury's mistaken belief that it was authorized to impose the death penalty if it found the non-statutory aggravating circumstance is discussed infra at 14-15.

Godfrey makes it clear that the limiting definition which is demanded is one which would narrow §(b)(7) so as to require, at the very least, a finding that the person to be sentenced to death possessed a "mental state that led [him]...to torture or commit an aggravated battery before killing his victim." Godfrey, supra at 4544.

This definition was found by the Godfrey plurality to be the result of the Georgia Supreme Court's "consistent conclusions respecting the §(b)(7) aggravating circumstance," Id. and the making of any ad hoc departures from these conclusions would "create a risk that the punishment [of death] will be inflicted in an arbitrary and capricious manner." Id. at 4543.

The requisite limiting definition must have been charged to the jury. Godfrey makes it plain that the purpose of the sentencing standards demanded by this Court in Furman v. Georgia, 408 U.S. 238 (1972) and Gregg v. Georgia, 428 U.S. 153 (1976) is to "channel the sentencer's discretion." Godfrey, supra at 4543. The constitutional flaw found in Godfrey was that the sentencer's discretion had not been channeled. "[T]he trial judge's sentencing instructions...gave the jury no guidance concerning the meaning of any of §(b)(7)'s terms. In fact, the jury's interpretation of §(b)(7) can only be the subject of sheer speculation." Id. at 4544.

Thus, the dictates of Godfrey require that the jury must be instructed to find that severe and serious physical abuse was intentionally inflicted on the victim by the person to be sentenced to death for the murder. As can be seen from an examination of the full sentencing instruction herein, these constitutional requirements were not met. The death sentence received by Kenneth Hardy is invalid since it is based upon a

naked §(b)(7) finding without the constitutionally demanded narrowing construction.

In addition to the requirement that the sentencing jury be guided by a limiting construction on a §(b)(7) charge, the Supreme Court of Georgia must also apply the required limiting construction in its sentencing review on appeal. This is so because the Georgia Supreme Court's review is a constitutionally required safeguard "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, supra at 204, and was relied on as such a safeguard by this Court when, in that case, it sustained the constitutionality of the Georgia statutory procedures. See also Gardner v. Florida, 430 U.S. 349, 361 (1977). Thus it was that Godfrey emphasized that the Georgia Supreme Court had failed to apply a constitutional construction to the §(b)(7) language. Unless a proper construction is employed in the sentence review conducted by the Georgia Supreme Court, a death sentence based on §(b)(7) cannot stand.

In petitioner's case the Georgia Supreme Court failed to apply the required limiting construction. While it found that the victim was severely and seriously physically abused, it did not specifically find that petitioner himself inflicted the injuries on the victim or that he intended to do so. Indeed, the Georgia Supreme Court refers to "the perpetrators"*/ indicating that the jury could have found, as part of the conspiracy, that the aggravated battery and/or torture of the victim was inflicted by one or more of the other persons who were involved in this crime and not by petitioner.

*/ Hardy v. State, supra 264 S.E.2d at 215 (Appendix A at 5a).

It is just such an evil that Godfrey seeks to cure. The offending §(b)(7) language, without the required limiting construction, would permit a jury to impose the death sentence based on the §(b)(7) aggravating circumstance even if the "torture" or "aggravated physical battery" were committed by another. Indeed it may well have done so in this case.

II. THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT A DEATH SENTENCE WAS AUTHORIZED UPON A FINDING OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE WAS AN ERROR OF CONSTITUTIONAL MAGNITUDE

The sentencing procedure in petitioner's case was further and fatally flawed by the erroneous charge to the jury that it could consider "robbery" as an aggravating circumstance and impose the death penalty upon that finding alone. The Supreme Court of Georgia essentially ignored this error by stating that since the jury found both aggravating circumstances and since only one statutory aggravating circumstance was required to authorize the imposition of the death penalty, the death penalty was lawfully imposed.

Pursuant to the Georgia statutory procedure, the sentencing jury makes its life-or-death decision after a deliberative process in which its "attention is directed to the specific circumstances of the crime [and]...the characteristics of the person who committed the crime." Gregg v. Georgia, supra at 197. The function of the statutory definitions of aggravating circumstances is to direct the sentencing jury's attention to the most relevant factors. Id. at 197-198. Although the trial judge may enumerate other non-statutory aggravating circumstances warranted by the evidence under §27-2534.1(b) and the jury may consider them all, the death penalty may be imposed only upon the finding of a statutory aggravating circumstance.

By erroneously instructing the jury that if they found that the offense was committed while the offender was engaged in a robbery the death penalty could be imposed*/ the trial court committed harmful error. This is especially so because the jury found the non-statutory aggravating circumstance as well as the statutory one and, having been instructed that the finding of either permitted the imposition of the death penalty, recommended the death penalty for petitioner upon the finding of both.

Under the Georgia scheme, a life sentence may be recommended even if two, or three, or more statutory aggravating circumstances are found. Although one statutory aggravating circumstance is enough to permit a death sentence, no particular number ever requires a death sentence. Thus, each and every aggravating circumstance which the jury finds could tip the delicate balance. And, if a death sentence is returned (as it was in this case), the part played in it by any particular aggravating circumstance which the jury found "can only be the subject of sheer speculation." Godfrey, supra at 4544.

As this Court has made abundantly clear, when a defendant's life hangs in the balance, "doubts [as to how defective jury instructions may have affected jurors' sentencing deliberations]...should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948). Thus the finding of the non-statutory aggravating circumstance erroneously permitted by the trial court's instructions and made by the sentencing jury may very well have spelled the difference between petitioner's life and his death. This can only be the "subject of sheer speculation" and such uncertainty is constitutionally impermissible. Godfrey, supra at 4544.

*/ Appendix B at 8a.

III. THE PROSECUTOR IMPROPERLY SUGGESTED TO THE JURY THAT THE SUPREME COURT OF GEORGIA ENDORSES THE DEATH PENALTY BY QUOTING FROM OPINIONS OF THAT COURT IN HIS CLOSING ARGUMENTS

Improper and inflammatory remarks made to a jury by a prosecutor during a closing argument in a criminal trial can be so prejudicial that they deprive a defendant of his Sixth and Fourteenth Amendment rights to a fair trial and due process. See Houston v. Estelle, 569 F.2d 372 (5th Cir.) (granting writ of habeas corpus), rehearing and rehearing en banc denied, 572 F.2d 372 (5th Cir. 1978). To permit such inflammatory argument in any trial violates the Constitution because "(h)ighly prejudicial remarks uttered by the prosecutor jeopardize the jury's deliberative processes and hence infringe upon an accused's right to a fair hearing...." Bruce v. Estelle, 483 F.2d 1031, 1040 (5th Cir. 1973), overruled in part on other grounds, 585 F.2d 752 (5th Cir. 1978) (granting writ of habeas corpus). Cf. Turner v. Louisiana, 379 U.S. 466, 472 (1965) ("exercise of calm and informed judgment by [the jury] is essential to proper enforcement of law"). To countenance the use of such prejudicial statements in a capital case, in which "[i]t is of vital importance...that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," (Gardner v. Florida, supra at 358) conflicts not only with established due process standards but also with the Eighth Amendment's demand for reliability in death penalty cases. Lockett v. Ohio, 438 U.S. 586, 601 (1978).

In addition, as this Court recognized in Taylor v. Kentucky, 436 U.S. 478 (1978), improper remarks made by a prosecutor in his closing argument can increase the impact of inadequate jury instructions, thereby creating the danger of an arbitrary and capricious jury verdict. Id. at 486-88.

Petitioner here seeks review of what appears to be a standard practice of Georgia prosecutors - the making of certain inflammatory, prejudicial statements during closing arguments which have been repeatedly criticized, but continue repeatedly to be condoned by the Supreme Court of Georgia. By criticizing this practice, the Supreme Court of Georgia has established its impropriety. By refusing to reverse sentences tainted by this practice, however, the Supreme Court of Georgia has permitted the practice to continue. In petitioner's case the effects upon the jury of the prosecutor's improper statements made during the sentencing phase closing argument were doubly compounded: first by the prosecutor's use of similar improper and similarly disapproved statements which were made shortly before to the jury during his closing argument in the guilt phase of the trial, and, additionally, by the failure of the trial court's instructions to guide the jury adequately in its sentencing determination.

The conduct in question is the quoting to the jury from the 120-year-old opinion of the Supreme Court of Georgia in Hawkins v. State, 25 Ga.207 (1858).*/ After first suggesting that failure to impose the death sentence has caused crime to increase ("We...see that for the past 10 years... [capital punishment] has not been carried out and...how our crime has increased; in this country it is rampant"),**/ the prosecutor invoked both the authority of the Georgia Supreme Court and "biblical" justice:

> We can go back to 1858 to a case of Hawkins versus the State. It's reported in the 25 Georgia Appeals, beginning 207 and Justice Lumpkin wrote on page 211: "Human life is sacrificed at this day, throughout this land, with more indifference than the life of a dog, especially if it is a good dog. Cain was the

*/ The prosecutor's closing argument the sentencing phase of petitioner's case is set forth in Appendix C.

**/ Appendix C at 13a.

> first murderer, but who is the last, is known only to those who have read the morning papers. If this crime goes unpunished, let our skirts, at least, be free from the stain of blood-guiltness."
>
> Your Honor, as I said that opinion was written in 1858 by Justice Lumpkin in our Supreme Court of the State of Georgia.

Not only was this language calculated to inflame the passions and prejudices of the jury but it implied to the jury that the Supreme Court of Georgia not only endorses the death penalty but, essentially, demands it in a murder case.

Furthermore, in its opinion in petitioner's case, the Georgia Supreme Court, while disapproving of the earlier reading by the prosecutor to the jury of similar inflammatory statements */ from Eberhart v. State, 47 Ga. 609 (1873), stated that the prejudicial impact of reciting from Eberhart was, in effect, blunted by the fact that "the prosecutor did not identify the judge who wrote them, [or] the court which decided the case..." Hardy v. State, supra at 264 S.E.2d at 214.**/ The prosecutor however did not similarly restrain himself during his closing argument in the sentencing phase of petitioner's trial. Thus the jury was encouraged to infer that respectable Georgia tradition and judicial authority supported sentencing Kenneth Hardy to death. In Hawes v. State, 240 Ga. 327, 336, 240 S.E.2d 833, 840 (1977), the Supreme Court of Georgia wrote,

> We do believe, however, that the remarks by the district attorney were improper. It would not have been improper for the district attorney merely to have expressed to the jury the sentiments embodied in the quote from Eberhart, supra. Cf. Chenault, supra. However, the district attorney's attribution of those sentiments to a justice of this court with the object of influencing the jury to impose the death penalty was improper and is disapproved. See Croom v. State, 90 Ga. 430(4), 17 S.E. 1003 (1892).

*/ The prosecutor's closing argument in the guilt phase is set forth in Appendix D.

**/ Appendix A at 4a.

Petitioner contends that the prejudicial effect of the Hawkins language was compounded by the previous misuse by the prosecutor of the Eberhart language, just hours before */, during the closing argument in the preceding guilt phase of the trial.

In Eberhart the Georgia Supreme Court affirmed the first death sentence ever imposed on a woman in Georgia. From the excerpts read by the prosecutor, the court can be heard to speak of the need to avoid "sickly sentimentality" and to adopt "[a] stern, unbending, unflinching administration of the criminal law...."**/ As the full opinion in Eberhart shows, the court was there concerned primarily with problem of sentencing women to death. However, the transcript of his two closing arguments demonstrates that the prosecutor in petitioner's case used both the Eberhart and Hawkins opinions to urge the jury to sentence the petitioner to death. In petitioner's case the prosecutor's excerpted quotations were particularly prejudicial because they magnified the impact of the inadequate jury instructions on sentencing.

This use of Eberhart and Hawkins in closing arguments is a common practice in Georgia capital cases. In recent years the Supreme Court of Georgia has repeatedly criticized such conduct. For example, in Zant v. Campbell, 245 Ga. 368, ___ S.E. 2d ___ (1980), the Georgia Supreme Court reviewed the granting of a writ of habeas corpus on the grounds that the death penalty had been

*/ The jury retired after closing arguments and instructions in the guilt phase at 4:55 p.m. on January 13, 1978 (Tr. p. 594) and, after returning a guilty verdict, retired again immediately after closing arguments and instructions in the sentencing phase at 8:40 p.m. of the same day (Tr. p. 652).

**/ Appendix D at 18a-19a.

unconstitutionally imposed and petitioner's 14th Amendment due process rights violated because of the reading by the prosecutor of both the Eberhart and Hawkins language. The Georgia Supreme Court wrote:

> " We have consistently noted that the practice of influencing the jury to impose the death penalty by implying that Justices of the Georgia Supreme Court would approve such a sentence was error under the due process clause of the Fourteenth Amendment, and that accordingly, a district attorney should not read to the jury the cited passages from Eberhart and Hawkins, so as to attribute, in the minds of the jury, the sentiment of said passages to the Justices of this Court. Potts v. State, 241 Ga. 67, 85 (243 SE2D 510) (1978); Presnell v. State, 241 Ga. 49, 62 (243 SE2D496) (1978); Lamb v. State, 241 Ga. 10, 15 (243 SE2D 59) (1978); Hawes v. State, 240 Ga. 327, 336, Supra. "

The Georgia Supreme Court noted that Campbell was tried prior to its decision in Hawes, supra*/ and it reversed the granting of the writ on the grounds that the use of the disapproved language was harmless error since the habeas corpus court found that the District Attorney had offered a life sentence in return for a guilty plea following several hours of jury deliberation.**/

In Hawes and Lamb, the Supreme Court of Georgia did not address the question of whether an Eberhart argument by a prosecutor constitutes reversible error, because other errors warranted reversal of the death sentences in those cases. In Potts and Presnell, however, that court held that such conduct, though improper and disapproved, does not constitute reversible

*/ Petitioner herein was tried in January, 1978, subsequent to the 1977 Hawes decision.

**/ The Court does not make it clear whether the jury knew of this offer. In any event this rationale is cryptic.

error. The court considered the issue in Potts and Presnell in determining, pursuant to Ga. Code Ann. §27-2537(c)(1), whether the death sentences in those cases were imposed improperly under the influence of passion, prejudice, or any other arbitrary factor. In Presnell the court concluded that "the facts of the case now before us are such that we find that the written words of a since deceased jurist could not have inflamed the jury more than the facts of the case themselves." 241 Ga. at 62, 243 S.E.2d at 507. The court provided no basis for that speculation about the impact of the Eberhart argument on the jurors' minds. In petitioner's case, too, the Supreme Court of Georgia criticized the prosecutor's use of Eberhart and Hawkins but refused to reverse the death sentence. The court stated, "[w]hile this court has condemned such practice, we have held it not to be error under the circumstances here (citations omitted)." 264 E.E.2d at 214 (Appendix A at 4a).

In petitioner's case, as in Presnell, the Supreme Court of Georgia, provided no basis for its speculation that the disapproved language "could not have injected an improper element of passion, prejudice or other arbitrary factor." (citation omitted) 264 S.E.2d at 214 (Appendix A at 4a).

With all due respect, the Supreme Court of Georgia is doing a poor job of discouraging prosecutors from making Eberhart and Hawkins arguments. By criticizing such conduct, yet refusing to reverse sentences which may be tainted by it, the Supreme Court of Georgia tacitly encourages these inflammatory speeches. That practice will be stopped only by imposing the sanction of reversing death sentences.

In United States v. Estepa, 471 F.2d 1132 (2d Cir. 1971) (Friendly, J.), the court dealt with the problem of ending a common, improper practice of prosecutors during grand jury proceedings. The court noted that it had given prosecutors clear warnings against the conduct in question in that case and then held,

> We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help translate the assurances of the United States Attorneys into consistent performance by their assistants. 471 F.2d at 1137.

The D. C. Circuit has also held that the calculated misconduct of prosecutors who refer to matter not in evidence during closing argument and thereby improperly inflame the passions and prejudices of the jury cannot and must not be tolerated and demands reversal. U. S. v. Whitmore, 480 F.2d 1154 (D.C. Cir. 1973); U. S. v. Hawkins, 480 F.2d 1151 (D.C. Cir. 1973).

The Supreme Court of Georgia appears to be unwilling to enforce its repeated criticism of Eberhart and Hawkins arguments by the sanction of reversing sentences. Petitioner urges this Court to adopt the view of the 2nd and D.C. Circuits on the need to end repeated prosecutorial misconduct by reversing the death sentence in this case.

But reversal for prosecutorial misconduct is not the sole reason why this court should grant certiorari herein. Scrutiny of the prosecutor's closing arguments can lead only to the conclusion that petitioner was deprived of his right to the fair prejudice-free determination of his sentence required by due process and by the Eighth Amendment.

CONCLUSION

For the reasons stated above, petitioner prays that this Court grant a writ of certiorari to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,

MARGUERITE B. FILSON
Western Electric Company, Incorporated
222 Broadway
New York, New York 10038

Attorney for Petitioner

July 2, 1980

HARDY

v.

The STATE.

No. 35588.

Supreme Court of Georgia.

Argued Jan. 14, 1980.

Decided Feb. 20, 1980.

[Headnotes omitted]

Summary of Facts

From the evidence presented at the trial, the jury was authorized to find the following facts.

Driving his pickup truck, the 60-year-old victim, Lewis J. Ingram, left his home in Thomasville, North Carolina, on July 26, 1977, en route to Commerce, Georgia, for the purpose of visiting relatives and friends. Upon arriving in Commerce, he visited his sister and spent one night in her home. The following day, he moved into a motel near Commerce and for the next four days spent a great part of his time at Willie Brown's Produce Stand on Highway 441 near Commerce. During the hours spent at the produce stand, the victim became acquainted with those persons who were operating the business and had the opportunity of talking with old acquaintances from Commerce, which was his boyhood home.

Upon leaving North Carolina, the victim had in his possession more than $1,000, mostly in one hundred dollar bills. His possession of a number of bills in large denomination became quickly known by several people. On the first night he was in Commerce, his sister saw the money he was carrying. An employee of the motel where he was staying also noticed a large amount of bills on the nightstand in his motel room. During his visits at Willie Brown's Produce Stand, the victim made several purchases from Dub Hardy, an employee at the stand, but did not pay for the purchases at the time because Mr. Hardy was unable to change the large bills being carried by Mr. Ingram. Dub Hardy is the father of the appellant in this case. Both he and his wife, Mary, worked at the produce stand.

During most of the time Mr. Ingram spent at the produce stand, he had exhibited indications of having consumed alcoholic beverages. On Saturday, being the fourth day of his visits at the stand, the victim met a number of people at the stand, including Dub and Mary Hardy, Billy Hardy, Carolyn Hardy, Edwin and Patsy McGill and Buster and Betty Minish. By the late afternoon, the victim was showing the effects of having consumed a considerable amount of alcohol. During Saturday evening, the victim, along with Buster Minish, left the produce stand to play poker at Billy Hardy's trailer. Buster Minish drove the victim's truck and his wife, Betty Minish, followed in another vehicle. Billy Hardy's trailer is situated only a few yards from the home of Dub Hardy. Billy Hardy and Kenneth Har-

dy, the appellant here, are sons of Dub and Mary Hardy. Betty Minish is the wife of Buster Minish and a cousin of Mary Hardy. When Dub and Mary Hardy arrived at their home, Lewis Ingram's truck was located in the yard next to Billy Hardy's trailer. Mary Hardy became concerned that trouble was about to develop and urged Dub Hardy to get the victim out of the trailer. The victim, Buster Minish and the appellant, who had arrived upon the scene, had been arguing. Dub Hardy went to his son's trailer and found the victim on a couch in a very drunken state. He took the victim by the arm and led him to the door where he missed one of the steps and fell into the yard. The appellant then attacked the victim with a wrench wrapped in a rag and severely beat him about the head. Dub Hardy made an attempt to stop the fracas but was restrained by Buster Minish. At this point, the appellant got a shotgun and he, together with Billy Hardy and Buster Minish took the victim into the woods where appellant attempted to force the victim to tell where his money was. This attempt was not successful. Having failed in this effort, appellant and his companions brought the victim back to the yard and put him in the back of his own truck where he was joined by appellant. Billy Hardy drove the victim's truck and Buster Minish followed in another vehicle for a distance of some ten miles to a secluded area. At some point, gasoline was poured on the victim and there is evidence that the victim begged, "Please don't pour that gasoline on me."

Appellant shot and killed the victim and then his body was burned, along with the truck.

The shotgun was thrown into a lake from which it was later recovered and ballistic tests determined the shotgun to have been the murder weapon. Upon returning to the Billy Hardy home, Billy and Kenneth Hardy, as well as Buster Minish, were seen to have blood on their clothing and a considerable amount of blood was on the ground in the yard near the Billy Hardy home.

On the following day, Billy Hardy and Minish, together with Minish's wife planned the story to be told by each of the parties in order to avoid implication in the murder. During the early morning hours of Sunday just following the murder, Buster Minish told his wife that the pickup truck in which the victim and Kenneth Hardy were riding went across a little bridge and one shot went off and as they went up the road farther, there was another shot. At this point, Billy Hardy jumped out of the truck and dragged Kenneth Hardy out of the back and said "You ain't got no damn sense. You didn't have to do that." Buster Minish also at this time told his wife that Kenneth Hardy fired the shot which killed the victim.

A few days later, Buster Minish committed suicide.

Enumerations of Error

[1] 1. In his first enumeration of error, the appellant complains of a failure on the part of the trial court to exercise its discretion as required by law. The investigating officer was allowed to remain in the courtroom after the rule of sequestration had been invoked but was not required to be the first witness to testify. Appellant does not argue that the trial court abused his discretion in allowing this to occur. See *McNeal v. State*, 228 Ga. 633, 187 S.E.2d 271 (1972). Instead, it is argued that the trial court did not use its discretion at all but rather decided as a matter of policy that the officer could be called to testify at such time as the prosecutor pleased. *Stuart v. State*, 123 Ga.App. 311, 180 S.E.2d 581 (1971). In *Stuart*, it was held that the trial court should exercise its discretion both as to permitting exceptions to the sequestration of witnesses and as to the sequence of calling unsequestered witnesses. The exercise of the trial court's discretion should be based upon a showing that the state has some need not to call the unsequestered witness as the first to testify.

In the instant case, the state requested that GBI agent Pat Patterson be allowed to remain in the courtroom for the purpose of

assisting the district attorney in the trial of the case. The state went further and stated, "his testimony will all be from investigation and nothing in the chronological order of the evidence we present." Appellant's attorney then objected to the witness being allowed to stay in the courtroom unless he be required to testify first. The court overruled the objection and in response to further argument of defense counsel on the point, the trial judge stated "... because I'm not going to dictate to the state in which manner the state introduces its evidence." The orderly presentation of evidence being a proper reason for an exception to the rule of sequestration, and the trial judge having based his ruling upon this exception, we find no error. *McNeal v. State*, supra.

2. The state called Mary Hardy who testified as to statements made to her by Billy Hardy which incriminated the appellant. She testified that upon his return from the murder scene, Billy Hardy told her that the appellant had "cut the victim all to pieces." Furthermore, the state offered the testimony of Betty Minish consisting of statements made to her by her now deceased husband the day after the killing. In these statements, Minish named appellant as the person who shot the victim. Attorney for appellant objected to the testimony of both witnesses on the grounds that the statements were hearsay. Appellant argues in his second and third enumerations of error that the trial court committed reversible error in overruling his objections and admitting the statements.

[2, 3] "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." Code Ann. § 38-306. The conspiracy is deemed in progress until its ultimate purpose is accomplished. It may include acts performed and declarations made after the commission of the crime. Conspiratorial efforts to conceal the fact of the crime and the identity of the perpetrators are a continuation of the conspiracy so that the parties to such a conspiracy would be considered so much of a unit that the declarations of either are admissible against the other. *Crowder v. State*, 237 Ga. 141, 227 S.E.2d 230 (1976); *Evans v. State*, 222 Ga. 392, 150 S.E.2d 240 (1966); *Chatterton v. State*, 221 Ga. 424, 144 S.E.2d 726 (1965).

[4] There was evidence sufficient to establish a prima facie case of conspiracy to rob and kill the victim and thereafter conceal the murder. The statements of Billy Hardy and Buster Minish were made during the pendency of the conspiracy in that the concealment phase of the conspiracy was plainly pending.

[5, 6] Appellant argues however that even though the conspiracy had not ended, the statements lack the "indicia of reliability that would afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement" which is required for admissibility. *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); *Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979). We do not agree. The indicia of reliability required for admissibility are that the statements be non-narrative; that the declarant is shown by the evidence to know whereof he speaks; that the witness is not apt to be proceeding on faulty recollection; and that the circumstances show that the declarant had no apparent reason to lie to the witness. *Mooney v. State*, supra. It is not required that all of the indicia be present for the statement to be admissible. *Mancusi v. Stubbs*, supra; *Mooney v. State*, supra. The final three indicia are present in the instant case.

It is undisputed that both the declarants were present at the scene of the murder and knew of the facts. It cannot be said that either witness, the mother of appellant or the wife of a co-conspirator was apt to be proceeding on faulty recollection. While Mary Hardy was a reluctant witness, she had given a statement five days after the crime which confirmed her testimony. The testimony of Betty Minish was positive and direct. The declarants had no apparent reason to lie to the witnesses. Both state-

ments were inculpatory in that they placed the declarants at the scene of the actual murder. Furthermore, Billy Hardy's statement was spontaneous and given immediately after the crime. Buster Minish's statement was made before coaching his wife as to an alibi story to present to the authorities in case they were questioned.

The admission of the statements made by Billy Hardy and Buster Minish was authorized by Code Ann. § 38-306. Appellant's enumerations of error 2 and 3 are without merit.

[7, 8] 3. Appellant in his fourth enumeration of error contends the trial court erred in failing to charge the jury on the law of voluntary manslaughter. Appellant relies on the testimony of Dub Hardy that he heard the victim, the appellant and Buster Minish arguing. The record is not clear as to who was arguing with whom; however, it is clear that nothing more than words were passed and no threats were heard. It should also be noted that the arguments occurred prior to Dub Hardy taking the victim out of the trailer. According to Dub Hardy, the victim was in a drunken state and fell to the ground as he left the trailer. See *Hill v. State*, 236 Ga. 703, 224 S.E.2d 907 (1976). In order to warrant a charge of voluntary manslaughter, the evidence must not only show an act of violent passion, but also some serious provocation sufficient to excite such passion in a reasonable person. *Swett v. State*, 242 Ga. 228, 248 S.E.2d 629 (1978); *Smith v. State*, 49 Ga. 482 (1873). We conclude from a study of the record that the evidence did not warrant a charge on voluntary manslaughter. Code Ann. § 26-1102; *Lowe v. State*, 240 Ga. 767, 242 S.E.2d 582 (1978). Furthermore, there was no written request to charge voluntary manslaughter. *Driggers v. State*, 244 Ga. 160, 259 S.E.2d 133 (1979); *Morgan v. State*, 240 Ga. 845, 242 S.E.2d 611 (1978); *State v. Stonaker*, 236 Ga. 1, 222 S.E.2d 354 (1976).

[9] 4. In his fifth enumeration of error, appellant contends there was a denial of due process of law as a result of the prosecutor reading from *Eberhart v. State*, 47 Ga. 598, 609 (1873). Prior to his opening argument, the prosecutor quoted to the court Code Ann. § 26-1101 and read dicta from *Eberhart*. Our review of that portion of the record reveals that in reading these passages, the prosecutor did not identify the judge who wrote them, the court which decided the case nor did he make any comments as to the outcome of the case. *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977). This court has previously stated its disapproval of the reading of certain passages from *Eberhart* and this same disapproval is reiterated here. However, we have held it not to be error under the circumstances of this case. *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1978).

Sentence Review

The remaining enumerations of error address themselves to the sentence and are best covered by the sentence review mandated by Code Ann. § 27-2537(c)(1-3).

[10] 5. Appellant assigns error by reason of the fact that the prosecuting attorney was allowed to read to the court dicta from the case of *Hawkins v. State*, 25 Ga. 207 (1858) prior to his argument to the jury on sentencing. It is contended that this resulted in the imposition of the death penalty under the influence of passion, prejudice and other arbitrary factors. *Hawkins v. State* contains dicta similar to *Eberhart v. State*, supra. While this court has condemned such practice, *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977), we have held it not to be error under the circumstances here. *Drake v. State*, supra; *Ruffin v. State*, supra; *Godfrey v. State*, supra. Furthermore, we find the evidence against the defendant to be so overwhelming that the reading to the court in the presence of the jury of the dicta referred to could not have injected an improper element of passion, prejudice or other arbitrary factor. *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 855 (1979).

Appellant's seventh enumeration of error is without merit.

After reviewing the entire record and transcript, we conclude that the sentence of death imposed on Kenneth Hardy was not imposed under the influence of passion, prejudice or any other arbitrary factor.

6. The trial court charged the jury in the sentencing phase that it could consider two aggravating circumstances. One, that the offense of murder was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7), and, two, that the offense of murder was committed while the offender was engaged in the commission of a robbery.

[11, 12] In his sixth enumeration of error, appellant contends it was error to charge as an aggravating circumstance that the offense was committed while the offender was engaged in a robbery. We do not agree. The statute allows the trial court to charge statutory and non-statutory aggravating circumstances. Code Ann. § 27-2534.1(b). While the jury would not be authorized to impose the death penalty based on a finding as to the non-statutory aggravating circumstance, they were authorized to consider it in arriving at their verdict. The jury returned its verdict finding, beyond a reasonable doubt, both the statutory aggravating circumstance and the non-statutory aggravating circumstance. A finding of only one statutory aggravating circumstance is all that is required to authorize the imposition of the death penalty. Code Ann. § 27-2534.1(c). The murder in this case was conducted in methodical execution-type fashion. The perpetrators severely beat and partially disrobed the victim seeking to find where the victim kept his money. The victim was "cut all to pieces" and gasoline was poured over him before he was shot. When appellant returned from the killing, he had blood on his clothing and there was blood in the yard where the victim was beaten. This clearly evidenced a depravity of mind on the part of appellant and involved torture to the victim. In both respects, it was outrageously and wantonly vile. The evidence supports the jury's finding of this statutory aggravating circumstance as well as the jury's finding of the non-statutory aggravating circumstance.

Furthermore, the evidence supports a finding of guilt beyond a reasonable doubt by a rational trier of fact. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and the verdict and sentence are factually substantiated. We have reviewed the charge of the trial court to the jury in the sentencing phase of the trial and find it is not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1978) and *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1978).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence has been imposed for murder, and we find the similar cases listed in the appendix support affirmance of the death penalty.

Kenneth Hardy's sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant.

Judgment affirmed.

All the Justices concur.

APPENDIX

Lingo v. State, 226 Ga. 496, 175 S.E.2d 657 (1970); *Johnson v. State*, 226 Ga. 511, 175 S.E.2d 840 (1970); *Hunter v. State*, 231 Ga. 494, 202 S.E.2d 441 (1973); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Tamplin v. State*, 235 Ga. 20, 218 S.E.2d 779 (1975); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978);

APPENDIX—Continued

Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979); *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979); *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979).

APPENDIX B

COURT'S CHARGE TO THE JURY

THE HONORABLE JAMES L. BROOKS

Mr. Foreman, ladies and gentlemen of the jury. The defendant in this case has been found guilty of the offense of murder and it is your duty at this time to determine within the limits prescribed by law, the penalty which shall be imposed for that offense.

Under the law of this State every person found guilty of murder shall be punished by death by electrocution or by life in prison.

I charge you that in arriving at your determination you must first determine whether at the time this crime was committed any one or more of the following statutory aggravating circumstances existed beyond a reasonable doubt. Now, the following aggravated circumstances, and only the following aggravated circum ... aggravating circumstances can you consider. As I said, you must first find that these existed beyond a reasonable doubt before the death penalty can be imposed.

The aggravating circumstances which you may consider are:

1. The offense of murder was outrageously

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and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Or

2. The offense of murder was committed while the offender was engaged in the commission of robbery.

Those are the only two aggravating circumstances which you are allowed to consider. And before the death penalty can be imposed, you must find that either one or both of those aggravating circumstances existed beyond a reasonable doubt.

Now, if you find that there was one or more of these aggravating circumstances existing beyond a reasonable doubt, then you would be authorized to consider imposing the sentence of death. If you do not find that one of these aggravating circumstances existed beyond a reasonable doubt, then you would not be authorized to consider the penalty of death. In that event, the sentence would be imprisonment for life.

The statutory instructions that you are authorized to consider which were these that I just read to you will be submitted in writing to you for your deliberations after you go out to the jury room. These will be sent out to you.

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In arriving at your determination as to what sentence is appropriate, you are authorized to consider all of the evidence received here in court; presented by the State and the defendant throughout the trial before you. You are authorized to include in your considerations the facts and circumstances, if any, in mitigation and aggravation. Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as an extenuating or reducing the degree of moral culpability of punishment. Aggravating circumstances are those which increase the guilt or enormity of the offense or add to its injurious consequences.

Now, I charge you this, that even if you find that one or more of these aggravating circumstances existed, you are not bound to impose ... you are not bound to find or impose the death penalty. You can impose the penalty of life imprisonment even if you find that one or both of these aggravating circumstances existed.

Now, ladies and gentlemen, the form of your verdict fixing punishment should read: "We, the jury, find" ... "We, the jury, fix the punishment

of the defendant at death". Or, "We, the jury, fix punishment for the defendant at life imprisonment".

When you reach a verdict, it must be unanimous, that is, all 12 jurors must agree before a verdict can be rendered. I've prepared a verdict. A form. I have prepared a form. I have not prepared a verdict. I have prepared a form for you to use in fixing your verdict. You have found the defendant guilty of murder. This form reads, "We, the jury, find the defendant, Kenneth Hardy, guilty and fix his punishment at"; you will write in right here (indicating) either "death" or "life imprisonment", in the ... over the line that has been prepared here. In addition to that, now if you find that his punishment should be life imprisonment, then your verdict would end there and you would simply date it and the foreman would sign. Now if you find that the punishment is to be death, then you would come down here (indicating) and there is, you will note, "We, the jury, find the following aggravating circumstances". You must write in one and two or one or two. You can write in one aggravating circumstances or both aggravating circumstances just as they appear on this form here

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But if you find the death penalty to be imposed, you must go further and say, "We, the jury, find the following aggravating circumstances" and write in the aggravating circumstances which you find. And those aggravating circumstances must be one or both of this one and two on this form here (indicating).

As I say, your decision as to what sentence to be imposed must be a unanimous decision. In arriving at the determination, you will apply the rules herein before given you in charge with respect to determine the penalty to be imposed. Again, your verdict should be in writing; should be in ink; it should be signed by your foreman and dated and returned into open court.

Now the Court, as I have indicated to you, will send out with you to the jury room the aggravating circumstances which you will be allowed to consider in fixing your determination as to whether or not the death penalty is imposed. Also, the Court will provide you with a form for your verdict. The two I've just mentioned to you.

You may now retire to the jury room after which time the forms can be sent out to you.

(Whereupon, at 8:40 p.m., the jury retired to

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APPENDIX C

CLOSING ARGUMENT

BY MR. HANCOCK:

May it please the Court. For many years the question of capital punishment has been debated by laymen, by lawyers and by the courts. In 1972 the Supreme Court of the United States returned the Furman ... of the Furman decision reversing Furman and the State of Georgia as to the death penalty.

Since that time, the legislature ... our Georgia Legislature passed a new sentencing bill, 27-2534.1. And this bill provided the necessary safeguards to meet the United States Supreme Court decision in the Furman decision. This law and this Court ... This law has been upheld during the past ... last year in the Gregg case that went up in Gwinnett County.

Now, this law provides that only the most horrible crimes are included. That there are ... were 10, now nine aggravating circumstances under which the State could ask for the death penalty. And that these must be served upon the ... one or more of these must be served upon the defendant before the State could ask for the death penalty.

Then after the jury decides the guilt or innocence of the defendant, a separate hearing was

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held ... is being held to give an opportunity to present to the jury anything he desires in mitigation of the crime and why the death sentence should not be imposed.

Then the jury must find one or more of those aggravating circumstances exists and write it in their verdict and explain why a death sentence is imposed if one is imposed.

Now, your Honor, all these safeguards have been provided in this ... the trial of this case. And he has been ... This defendant has been afforded all the due processes of law before you today.

Your Honor, some people, many people ... some anyway are opposed to capital punishment and submit that it is not a deterrent to crime nor does it do anything to rehabilitate the criminal. I submit, your Honor, that capital punishment is a deterrent to like crimes.

No one can determine what ... who has been prevented from committing murder and other horrible crimes by the use of capital punishment in these type cases. We do not know and see that for the past 10 years that it has not been carried out and that how our crime has increased; in this country it is rampant.

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We can go back to 1858 to a case of Hawkins versus the State. It's reported in the 25 Georgia Appeals, beginning 207 and Justice Lumpkin wrote on page 211: "Human life is sacrificed at this day, throughout this land, with more indifference than the life of a dog, especially if it is a good dog. Cain was the first murderer, but who is the last, is known only to those who have read the morning papers. If this crime goes unpunished, let our skirts, at least, be free from the stain of blood-guiltness."

Your Honor, as I said that opinion was written in 1858 by Justice Lumpkin in our Supreme Court of the State of Georgia.

There are also those, your Honor, who believe it is wrong for the State to execute a murderer as it was ... just as wrong for the State to execute a murderer as it was for the murderer to kill. I subrit, your Honor, that imposing the death sentence is different than the murderer on trial.

A murderer believes in capital punishment; and without a Judge, a jury or a public hearing where the friends and relatives of the victim and the public can attend. This defendant believed in it, for he similarily killed his victim.

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The murderer executes an innocent person. The State executes a guilty person. The murderer puts his victim to death in a heat of passion, for greed or hate. The State, however, puts a murderer to death calmly and in the interest of justice. A murderer gives his victim no opportunity to repent or to prepare to meet his or her God. But the State gives the condemned murderer ample time to prepare and meet his maker. A murderer puts his victim to death in order to satisfy his own feelings of anger and hatred. The State puts a murderer to death only to satisfy the demands of justice. A crime of murder is a crime against not only the victim but against the whole of society.

Not long ago this afternoon, I told you that you and I both had a duty to perform which neither of us chose. We're both right back again the same place; you as 12 honest, upright jurors seeking to find the truth and do justice. To ask 12 people to send, condemn a person to the electric chair is just about as crucial a position, a job or responsibility as yours; and my responsibility is somewhat along the same, that, I am before you tonight asking you to do. I think it is justified. I think it is justice.

Now, you've heard all of this evidence and you've returned a verdict. You've performed part of your duty. After I sit down over there in a minute, I will have performed all of my duty to the best of my knowledge and ability.

Kenny Hardy, why? Why do I say to you; is that justice? Can you imagine; you have a person coming back laughing, joking from a gruesome murder; leaving a scene such as that right there (indicating); a human being in that condition. And within a few minutes time, Kenny came out with two shotgun shells in his hand laughing and joking. This person, L. J. Ingram, a human being, burned, charred, shot, beat, cut, left lying on a side road in Banks County at 12:00 o'clock on ... around 12:00 o'clock on Saturday night, July 30th, 1977. And then to say that's justice. Tell that woman sitting over there. Tell her that. I don't believe the people of Banks County want that kind of justice either.

Why was it that way? He's got $7 thousand dollars. We're going to play poker. He's too drunk. I can get it quicker than that. Beat him; cut him all to pieces, with the pleas, the desperate pleas, from that man right here in Banks County

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Please don't pour that gasoline on me and then go right on. Mercy; if that's mercy, I ask you for it. If you can look at that picture and these other pictures and say that's mercy; that's a kind of mercy. That's the kind of mercy he showed. Then I ask you to show him the same kind and I ask you to return a verdict of guilty by death.

Thank you.

oOo

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APPENDIX D

CLOSING ARGUMENT
by
NAT HANCOCK

May it please the Court, Mr. Benton. Your Honor, this indictment was drawn under Section 26-1101 of the Criminal Code of Georgia: 'Murder. A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and maligant heart.'

Your Honor, I'd also like to call the Court's attention to the case in 219 Georgia Reports, 821 quoting from Eberhart versus the State in 47 Georgia page 598.

'We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the

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axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which bloody deeds occur. A stern, unbending, unflinching administration of the penal laws, without regard to position or sex, as it is the highest mark of civilization, is also the surest mode to prevent the commission of crime.

Now, ladies and gentlemen, I'm not going to be too long up here before you. I'm tired, and I know you are too. But we come to a time in our life, yours and mine, when we are called upon to perform some duty that we would rather not do. You as 12 honest, upright citizens of Banks County who were called upon for jury duty for this term of court and brought into this court room to represent the people of Banks County, and I as your District Attorney whose duty it is to prosecute all accused of a crime and protect the innocent, you and I have no clients except the people of Banks County whom you represent. You have come from all sections of the county; some of you I know, and many of you I

don't.

You were not brought into this courtroom to do an injustice to anyone but to do justice to Kenneth Hardy and to Mrs. L. J. Ingram, you, as I represent the chain of law enforcement.

We have the Sheriff, the Deputy Sheriff, the G.B.I. and at this moment, I would like to compliment them on their investigation of this case, Henry Crane and his deputy, Mr. Patterson and Mr. Thompson, all of them. They did a wonderful job. But you are also a part of that chain along with the Grand Jury and the District Attorney whose job it is to present to you from that witness stand the evidence in a fair, just and reasonable manner. That we have tried to do to the best of our knowledge and ability.

You in the jury box at the beginning of this trial took an oath: I will a true verdict give according to the evidence presented before you. And, you're just as much a part of that chain as anyone else. More so because you are the last ones to speak. The Judge will charge you the law in the case and then it goes in your lap. It's thrown in your lap and there's nobody to throw it on back to. It stops right there with you and your conscience. It has nowhere else to go.

You have heard this indictment read to you at the

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beginning of the trial in my opening statement, and I told you at that time that there were five elements to the crime of murder, and I named them, and I told you that we expected ... the State expected to prove to you all of those elements, which is our obligation, of that crime, that he, unlawfully and with malice aforethought, either expressed or implied, caused the death of another human being. I can honestly say to you at this time that we have fulfilled our obligation to you.

My deduction from this evidence is that we have proved beyond a reasonable doubt each and every one of those elements of the crime of murder according to the Code Section which you have heard and which the Judge will charge you.

Now, there are two things that I want to begin by saying to you. During my nine years experience in prosecution, very few times have I gone before a jury but what I didn't find two things that existed. One of 'em is that that lawyer's going to say... it don't make no difference who it is if it's Eddie Benton or whoever he is ... he's going to say, try somebody else. Don't try my client. It's coming. You can look for it. The other one is those two great magic words that fall down like manna from heaven, reasonable doubt. You'll

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find them every time you get up here.

Now the Judge is going to charge you on reasonable doubt, and I want you to listen to him. What does it mean? It doesn't mean a mathematical certainty. It means just this. It's you and your conscience. It's that 13th juror in this box with each and everyone of you. It means that if there's something you heard from this witness stand yesterday and today , if there's something in there that makes you say, whoa, whoa, wait a minute, that creates a doubt... that created a doubt in my mind or in my heart or in my conscience as to the guilt or innocence of Kenneth Hardy ... was it ... was it there? That's what reasonable doubt is and that's what it means morally, legally and every other way.

Now, I'm not going to try to stand here before you in the first place ... I've often wondered about closing arguments, how much good they did for me to give one or try to attempt to. I certainly don't think, and I'm not egotistical enough to think that I can get up here and convince you of anything. I'm not going to try to. There's one ... there's several things in this evidence, and I'm not going over all of it with you, but there's several things in this evidence that I just want to go over with you.

Now, I mentioned in the opening statement six

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names that you would hear in this case. That L. J. Ingram, a human being, with as much right to live, give love and be loved as you and I, left Thomasville, North Carolina, on the morning of July 30th, 19 ... in the afternoon, I believe ... 1977 and came to Commerce, Georgia.

That he spent the night ... was in Commerce that night, and that he was around Wednesday, Thursday and Friday at Charlie Willie Brown's Store.

It's undisputed that Dub and Mary Hardy were working up there that they were together. That Dub knew him and talked to him that Willie Brown knew him ... knew who he was.

That he had some money in hundred dollar bill denominations. There was evidence he had at the motel down there $900.00 and something dollars when he left and $500.00 or hundred dollar bills down there at the motel.

There is undisputed evidence that he was up there on Saturday afternoon and Buster Minish was up there. Billy Hardy was up there. That they left there going over to Billy Hardy's to play poker.

That he was drinking, and that he was siting in there on the couch and that later on that Billy and Kenny Hardy and Buster Minish were in there, went in there and

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get him out. It's undisputed evidence that he was pushed, fell or something right there on the ground and that he was beat on with a wrench wrapped up in a white towel.

It's undisputed that Kenny Hardy had this shotgun out at Billy Hardy's trailer in his hand; that he pointed it at him and told him, Where is it? Where's what? My deduction is that money he had. That he was beat up; that he was bleeding, and that he either walked or was led, pulled or someway or another he got up to his truck with the camper on it. That he someway or another got in the back of that camper and then Kenneth Hardy got in that camper with the shotgun. It's undisputed.

That Buster Minish ... with Billy Hardy evidently driving. They left that night from Jackson County and drove nine or ten miles up into Banks County on a dirt road with Kenny Hardy in the back of the truck with that shotgun and L. G. ... with L. J. Ingram beat up, bleeding and lying in that camper or sitting in it.

We don't know, but he was in there. We know that they came back. Who came back? Kenneth Hardy, Buster Minish, and Billy laughing. Kenneth had two shotgun shells in his hands. That evidence is undisputed

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before you.

It's undisputed that L. J. Ingram ... and there is his picture, State's Exhibit No. 1(a). You'll have it out with you along with his wife and his family.

And, that's what they left out there, State's Exhibit No. 5. And, that's his truck he was in. One leg is all that is identifiable of L. J. Ingram that remained.

From there to the autopsy and where it was determined that the cause of the death ... and from that body right there came these which were identified as shotgun pellets. That's where they came from.

They left him up there afire. My deduction is there was something said about gasoline. We don't know. It's undisputed, the gasoline. There was a shotgun blast. We know that. We know he burned up beyond ... to a charred remains, unidentifiable. We know that.

We know there was a fire, and my deduction is that it was caused by that shotgun blast --

MR. BENTON: -- If Your HOnor --

MR. HANCOCK: -- when he was hit.

THE COURT: -- Just a minute, Mr. Hancock.

MR. BENTON: That's all right. Go ahead. I'm sorry. I'll withdraw it.

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THE COURT: Okay. Go ahead.

MR. HANCOCK: Huh?

THE COURT: Go ahead.

MR. BENTON: Go ahead.

MR. HANCOCK: And he was dead from that shotgun wound. They left there, that house, that night. They went their various ways. Kenneth went up to Cartersville to work like nothing happened. Nobody hurt; nobody had done anything; go back and go to work. And then in the early hours of Wednesday morning ... Saturday night around 12 o'clock was when it happened.

Now, you've heard all of this evidence through them ... Doctor Dawson, GBI Agent Ward, the polygraph ... lie detector testimony. The Judge is going to charge you that that's an opinion in the evidence and that's what he gave was his opinion. And he told you why he did, ladies and gentlemen, how he arrived at his opinion. And an expert witness has a right to. "Did you pour gas on Mr. Ingram?" "No." The man said he was lying in his opinion. "Did you shoot L. J. Ingram?" "No, I didn't do that." That expert witness said he was lying in his opinion. Did he? He was in that truck when it left the house with that shotgun and

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and L. J. Ingram was in it. The truck and L.J. Ingram were left up there at Banks County 10 miles from there burning. Did he do it? That's for you to decide.

Now, it's up to you and I know when I sit down I'll think of a hundred other things that I wish I had said. But it's in your lap and on you and your conscience. There's two questions I want to ask you before I leave. Did L. J. Ingram, a human being, meet his death in Banks County on July 30th, 1977 from natural causes or was there some criminal element that caused his death? There's undisputed evidence that he did. Then, is that boy, Kenneth, responsible for those criminal means?

This has been a long, hard case for all of us. I appreciate your attention and I ask you that under this evidence to return a verdict of guilty as charged. I thank you.

THE COURT: Now, I want that charge. I want the charge.